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No. 07-324
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IN THE SUPREME COURT OF THE UNITED STATES

VICTOR McKEEVER,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where a federal court vacates two counts of a multi-count state conviction by grant of writ of habeas corpus under 28 U.S.C.§2254 and remands to state court for the purpose of fashioning an appropriate remedy, should this Court grant certiorari to consider whether the federal court erred in failing to order the state court to perform the specific remedy of rescission of the guilty plea in its entirety.

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COUNTER-STATEMENT OF THE CASE

In 1995, Victor McKeever was charged by the Commonwealth of Pennsylvania with numerous offenses pertaining to the distribution of heroin and two counts of corrupt organizations, 18 Pa.C.S. §911(b)(3) and (b)(4)(West 2007), alleging his participation in an organization solely devoted to the distribution of heroin. McKeever pled guilty to all counts. The Commonwealth agreed that counts 2 and 3 (corrupt organizations and corrupt organizations conspiracy) would merge for sentencing and further agreed not to object if the sentences imposed on Counts 1, 2, 3 and 4 were concurrent with each other and remaining counts. These were the only negotiated terms of the plea agreement. Appendix 35a -36a.

McKeever was sentenced July 24, 1995, to a prison term of 15 to 24 years. On merged charges of corrupt

organizations, McKeever received a one to seven year sentence imposed concurrently with a two to seven year sentence on Count 5, delivery of 40 bags of heroin. The sentence on Count 5 was to be served consecutive to a sentence imposed on a different state conviction. Sentences on five other counts of drug delivery and one count of dealing in proceeds of unlawful activity were imposed consecutively to each other.

In 1996 the Pennsylvania Supreme Court held that Pennsylvania's corrupt organizations statute, 18 Pa.C.S. §911, was not intended to reach organizations whose sole purpose was the conduct of illegal activities. *Commonwealth v. Besch*, 674 A. 2d 655 (Pa. 1996). Prior to *Besch*, controlling Pennsylvania law held that prosecution for corrupt organizations would extend to an "enterprise" dedicated solely to

illegitimate purposes. *Commonwealth v. Yacoubian*, 489 A.2d 228 (Pa. Super. 1985). Construction of a statute by the Pennsylvania Supreme Court relates back to adoption of the statute, *Fiore v. White*, 562 Pa. 634, 757 A.2d 842 (2000), so *Besch* was understood as stating the proper interpretation of the corrupt organizations statute from the time the statute was adopted. (The Pennsylvania Legislature has since amended the statute so as to reach both legitimate and wholly illegitimate organizations. 18 Pa. C. S. §911(b)(3)(West 2007), as amended June 19, 1996.)

McKeever sought application of *Besch* through the Post Conviction Relief Act (PCRA), 42 Pa.C.S.§9541 *et seq* (West 2007) so as to vacate the convictions of corrupt organizations. The Court of Common Pleas of Erie County dismissed the petition as untimely. The Pennsylvania Superior Court affirmed.

Commonwealth v. McKeever, No. 1051 WDA 2003, slip op. (February 20, 2004 Pa. Super)(memorandum). *See* Appendix 36a.

McKeever filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania wherein he asserted the conviction was obtained and/or sentence imposed in violation of the Fifth and Fourteenth Amendment rights to due process and equal protection, the Eighth Amendment guarantee to be free of cruel and unusual punishment and the Sixth Amendment right to effective assistance of counsel. The Federal Magistrate found "actual innocence" excused the lack of exhaustion and procedural default of the claim in state court, and recommended that a writ of habeas corpus issue. Supplemental Appendix 1sa-8sa.

McKeever filed objections, asking that the District

Court additionally rescind the entirety of McKeever's 1995 state court guilty plea. Respondents filed objections to McKeever's request. By order and opinion of March 23, 2005, the District Court adopted the Magistrate's Report and Recommendation and granted the writ of habeas corpus. Appendix 35a-42a. The writ was stayed for a period of 180 days to permit the Court of Common Pleas of Erie County to vacate the convictions of corrupt organizations, 18 Pa. C. S.§911(b)(3) and 911(b)(4), (Counts 2 and 3)and call McKeever for re-sentencing. Appendix 42a.

Through a Motion to Alter Judgment, McKeever again sought a District Court order rescinding the state court plea agreement. The District Court denied the motion. McKeever obtained a certificate of appealability and brought an appeal. The Third Circuit held that the District Court did not err in

granting McKeever's writ of habeas corpus and leaving the remedy to the Commonwealth.

This petition for writ of certiorari then followed.

In response to the United States District Court order, the state trial court vacated the convictions of corrupt organizations, and on April 26, 2005, sentenced McKeever to an aggregate term of 15 to 42 years in prison, and denied various motions filed prior to re-sentencing, including a motion to withdraw the guilty plea. The Pennsylvania Superior Court affirmed the judgment of sentence. *Commonwealth v. McKeever*, No. 880 WDA 2005, slip op. (Superior Court, January 27, 2006)(memorandum). The Pennsylvania Supreme Court denied a petition for allowance of appeal by Order of September 6, 2006, at No. 78 WAL 2006. McKeever then filed a petition under the Post Conviction Relief Act, 42 Pa.C.S. §9541

et seq. (West 2007). The lower court denied relief. Appeal is now pending in the Pennsylvania Superior Court at No. 1631 WDA 2007.

REASONS TO DENY THE WRIT

I. The Third Circuit Opinion Is An Inappropriate Vehicle For Consideration of The Question Posed By Petitioner.

A. The Third Circuit Decision For Which Certiorari Is Sought Did Not Rule On The Question Of When Mutual Mistake of Fact Mandates Rescission Of A Guilty Plea.

McKeever, a state prisoner, obtained a writ of habeas corpus to two counts of corrupt organizations, 18 Pa.C.S. §911(b)(3)and (4)(West 2007) to which he pled guilty. McKeever would have preferred the U.S. District Court to have vacated, or to have directed the state court to vacate, the entirety of his plea agreement, which encompassed pleas to numerous counts of heroin trafficking in addition to the two vacated charges of corrupt organizations. In pursuit of this goal, McKeever asks the Court to grant certiorari to consider "[w]hether a plea agreement

that is based on the parties' mutual mistake about an essential element of charges to which the defendant pled guilty is constitutionally invalid and voidable at the option of the defendant." Petition, Question Presented.

Certiorari to address this question should not be granted because the holding of *McKeever v. Warden* does not turn on the question Petitioner poses.

McKeever held that the District Court did not err granting in a writ of habeas corpus as to two counts of corrupt organizations, 18 Pa.C.S.§911(b)(3)and (b)(4) and leaving the specific remedy to the Commonwealth of Pennsylvania. Petition 15a. *McKeever* obtains from the proper understanding of 28 U.S.C.§ 2254 through which a state prisoner may seek federal habeas relief. Habeas jurisprudence neither requires, nor authorizes, a federal court to

order a state court to fashion a particular remedy. "Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power; *it cannot revise the state court judgment*; it can act only on the body of the petitioner." *Fay v. Noia*, 372 U.S. 391, 430 (1963)(*emphasis supplied*), overruled in part by *Wainwright v. Sykes*, 433 U.S. 72, 73 (1977)(substituting "cause and prejudice" for "knowing waiver" or "deliberate by-pass" in assessing state prisoner's procedural default of claims in state court); *Coleman v. Thompson*, 501 U.S. 722, 726 (1991).

If the vacating of the corrupt organizations convictions and re-sentencing in state court triggered a constitutional infirmity in the remaining guilty plea

(which encompasses numerous heroin trafficking charges), then McKeever was free to raise anew (and, in fact, has raised) such a claim in state court. As of this writing, review of the denial of post conviction relief is pending in the Pennsylvania Superior Court. *Commonwealth v. McKeever*, No. 1631 WDA 2007.

The Third Circuit affirmance of the grant of the writ as ordered by the District Court and the ensuing process in state court comports with principles inherent in federal habeas law. "Because it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation, federal courts apply the doctrine of comity, which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty

with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter. *Coleman v. Thompson*, 501 U.S. 722, 731 (1991)(internal citations omitted).

While the Third Circuit engaged in discussion of the question which McKeever now poses, the discussion was entirely unnecessary to the holding and is properly characterized as *obiter dicta*. Because *McKeever v. Warden* turns on application of principles inherent in federal review of a state court conviction and contains no binding authority on rescission of a guilty plea, the Third Circuit determination is an inappropriate vehicle for review of the question of when mutual mistake of fact requires rescission of a guilty plea. For this reason, certiorari should not be granted.

B. Cited Circuit Court Decisions Which Dispose of Claims Of Federal Prisoners On Direct Appeal Are Not In Conflict With The Third Circuit Disposition of The Habeas Petition of State Prisoner McKeever.

This Court will consider a grant of certiorari, "when a United States court of appeals has entered a decision in conflict with another United States Court of Appeal *on the same important matter*." Sup.Ct.R. 10 (emphasis supplied). The cited Seventh, Ninth and Tenth Circuit cases uniformly arise on direct review of a federal conviction. The relief obtained by state prisoner McKeever in the Third Circuit turns on principles of federalism and comity inherent in federal review of state court convictions. Consequently, *McKeever v. Warden* does not concern the "same important matter" as cited decisions from the Seventh, Ninth and Tenth circuits. Petition, pp. 8-14.

Accordingly, the Third Circuit determination is not in conflict with cited decisions of sister circuits. *See e.g, United States v. Bradley*, 381 F. 3d 641 (7th cir. 2004) (motion to withdraw federal guilty plea); *United States v. Williams*, 198 F.3d 988 (7th Cir. 1999)(direct appeal of federal conviction); *United States v. Sandles*, 80 F. 3d 1145 (7th Cir. 1996)(direct appeal of federal conviction); *United States v. Barren*, 172 F. 3d 1153 (9th Cir. 1999)(*en banc*)(motion to vacate sentence on federal conviction); *United States v. Bunner*, 134 F. 3d 1000 (10th Cir. 1998)(appeal from entry of federal guilty plea).

C. Cited State Court Decisions Are Not In Conflict With the Third Circuit Decision For Which Review Is Sought.

McKeever v. Warden is not, as Petitioner asserts, in conflict with cited state appellate court decisions,

Petition 14, nor is any such conflict possible. *McKeever v. Warden* is brought under 28 U.S.C. §2254. In *McKeever*, the Third Circuit considered the proper scope of relief obtainable by a state prisoner seeking writ of habeas corpus pursuant to 28 U.S.C. §2254, and nothing more. No state court appellate decision would ever have cause to consider, and rule on, the scope of relief obtainable by application of 28 U.S.C. § 2254. Because the holdings of cited state court decisions and the holding of *McKeever v. Warden* turn on entirely different bodies of law, no conflict exists between the cited state cases and *McKeever*.

D. Regardless of Whether The Question As Framed By the Petitioner Is A Matter of Importance to Both State and Federal Criminal Justice Systems, The Holding Of The Decision For Which Review is Sought Does Not Turn On The Question Posed.

Finally, McKeever urges that certiorari be granted because the question he poses is "exceptionally important to state and federal criminal justice systems." Petition 23. The question of whether, or when, mutual mistake may render a guilty plea constitutionally invalid may well be a question of importance to state and federal courts; however, the decision for which certiorari is sought is not the proper vehicle for consideration of this issue.

As Respondents have discussed throughout, the holding of *McKeever v. Warden* is discrete and limited to application of federal habeas law as set out at 28 U.S.C.§2254. "We hold that the District Court did not err in granting McKeever's writ of habeas corpus and leaving the remedy to the Commonwealth." Petition, 15a. *McKeever v. Warden* is a wholly inadequate vehicle for consideration of the question which

Petitioner poses: Whether a plea agreement that is based on the parties' mutual mistake about an essential element of charges as to which the defendant pled guilty is constitutionally invalid and voidable at the option of the defendant." Petition, Question Presented.

CONCLUSION

McKeever v. Warden presents no constitutional infirmity requiring the corrective process of this Court. Moreover, the holding of *McKeever* does not turn on the question which Petitioner poses. Respondents ask the Court to deny the petition for writ of certiorari to the United States Court of Appeals for the Third Circuit.

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